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4 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
5 AT TACOMA

6 KATHLEEN A. KISER,

7 Plaintiff,

8 v.

9 NANCY A. BERRYHILL, Acting
Commissioner of Social Security

10 Defendant.

Case No. 2:16-cv-01814-TLF

ORDER REVERSING AND
REMANDING THE
COMMISSIONER'S DECISION TO
DENY BENEFITS

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12 Plaintiff Kathleen A. Kiser has brought this matter for judicial review of the
13 Commissioner's denial of her applications for disability insurance and supplemental security
14 income (SSI) benefits. The parties have consented to have this matter heard by the undersigned
15 Magistrate Judge. 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73; Local Rule MJR 13.
16 Because the ALJ erred in failing to fully consider Ms. Kiser's Interstitial Cystitis (IC) and in
17 discounting her credibility, the Court finds that the Commissioner's decision to deny benefits
18 should be reversed, and that this matter should be remanded to the Commissioner for further
19 administrative proceedings.

20 FACTUAL AND PROCEDURAL HISTORY

21 On August 29, 2013, Ms. Kiser filed an application for disability insurance benefits and
22 another one for SSI benefits, alleging in both applications that she became disabled beginning
23 June 8, 2013. Dkt. 9, Administrative Record (AR) 20. Her applications were denied on initial
24 administrative review and on reconsideration. *Id.* On March 10, 2015, a hearing was held before
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1 an administrative law judge (ALJ), at which Ms. Kiser appeared and testified as did a vocational
2 expert. AR 41-94.

3 In a decision dated June 17, 2015, the ALJ found that Ms. Kiser could perform other jobs
4 existing in significant numbers in the national economy and therefore that she was not disabled.
5 AR 20-34. Ms. Kiser's request for review was denied by the Appeals Council on October 21,
6 2016, making the ALJ's decision the final decision of the Commissioner, which plaintiff then
7 appealed in a complaint filed with this Court on November 30, 2016. AR 1; Dkt. 3; 20 C.F.R. §
8 404.981, § 416.1481.

9 Ms. Kiser seeks reversal of the ALJ's decision and remand for further administrative
10 proceedings, arguing the ALJ erred in failing to:

- 11 (1) fully consider Ms. Kiser's IC and the combined effects of her
12 impairments and resulting limitations;
- 13 (2) provide clear and convincing reasons for discounting Ms. Kiser's
14 credibility; and
- 15 (3) properly assess the medical opinion evidence in the record.

16 For the reasons set forth below, the Court finds that the ALJ erred in failing to fully consider Ms.
17 Kiser's IC and in discounting her credibility, and therefore in finding her to be disabled. Remand
18 for further consideration of those issues is thus warranted.

19 DISCUSSION

20 The Commissioner's determination that a claimant is not disabled must be upheld if the
21 "proper legal standards" have been applied, and the "substantial evidence in the record as a
22 whole supports" that determination. *Hoffman v. Heckler*, 785 F.2d 1423, 1425 (9th Cir. 1986);
23 *see also Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004); *Carr v.*
24 *Sullivan*, 772 F.Supp. 522, 525 (E.D. Wash. 1991). "A decision supported by substantial
25 evidence nevertheless will be set aside if the proper legal standards were not applied in weighing

1 the evidence and making the decision.” *Carr*, 772 F.Supp. at 525 (citing *Browner v. Sec’y of*
2 *Health and Human Servs.*, 839 F.2d 432, 433 (9th Cir. 1987)). Substantial evidence is “such
3 relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”
4 *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citation omitted); *see also Batson*, 359 F.3d at
5 1193.

6 The Commissioner’s findings will be upheld “if supported by inferences reasonably
7 drawn from the record.” *Batson*, 359 F.3d at 1193. Substantial evidence requires the Court to
8 determine whether the Commissioner’s determination is “supported by more than a scintilla of
9 evidence, although less than a preponderance of the evidence is required.” *Sorenson v.*
10 *Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975). “If the evidence admits of more than one
11 rational interpretation,” that decision must be upheld. *Allen v. Heckler*, 749 F.2d 577, 579 (9th
12 Cir. 1984). That is, “[w]here there is conflicting evidence sufficient to support either outcome,”
13 the Court “must affirm the decision actually made.” *Allen*, 749 F.2d at 579 (quoting *Rhinehart v.*
14 *Finch*, 438 F.2d 920, 921 (9th Cir. 1971)).

15 I. The ALJ’s Evaluation of Ms. Kiser’s Interstitial Cystitis

16 With respect to Ms. Kiser’s IC, the ALJ found:

17 . . . [T]he claimant’s . . . interstitial cystitis . . . diagnosis was allegedly made
18 in 2000, associated with a bladder that was always “burning” and a variety of
19 surgeries, although other evidence shows mention of this impairment in 1998.
20 In fact, the claimant had cystoscopy, bladder hydrodistension, and bladder
21 biopsy in December 1998. She complained that this impairment awakened her
22 5 to 7 times a night to void and caused her to go to the toilet frequently in the
23 day. By her description in February 2014, flares of this impairment were
24 “razors in her urethra”.

25 . . .

At times . . . the claimant’s testimony is inconsistent with the evidence. At the
hearing, the claimant stated she did not like to take a bus due to urinary issues.
For instance, she told Emily Bradley M.D., of the Polyclinic that she had
frequent urination. However, the claimant also stated that she has had

1 interstitial cystitis since 1995. Yet, she was able to work for many years after
2 that date without any apparent problem, as evidenced by posting of earnings
3 in 1997, 1998, 2005, 2006, 2007, 2008, 2009, 2010, 2011, and 2012.
Furthermore, in reporting the frequent urination in February 2014, the
claimant stated, “she is not really bothered by her current symptoms.”

4 AR 23, 28 (internal citations omitted). Ms. Kiser argues these reasons for dismissing seemingly
5 any limitations stemming from her IC are contrary to the substantial evidence in the record. The
6 Court agrees.

7 First, it is wholly unclear why Ms. Kiser’s testimony that she had frequent urination and
8 therefore did not like to take the bus, is inconsistent with the fact that she has had IC since 1995.
9 Clearly, both can be possible. Second, as Ms. Kiser notes for many of the years during which she
10 had earnings, those earnings were fairly limited. *See* AR 296. And as the list of earnings-years
11 contained in the record indicates, a number of these years Ms. Kiser apparently had no earnings
12 at all. *Id.* Further, even in those years, for instance 2008 and 2009, for which the record shows
13 Ms. Kiser had fairly substantial earnings, there is nothing to indicate that Ms. Kiser’s IC had no
14 vocational impact in regard to any of the work she did.

15 Third, the medical evidence in the record indicates Ms. Kiser’s IC is not as improved or
16 stable as the ALJ indicates. As the ALJ noted, in February 2014, Ms. Kiser reported that “[w]hen
17 she gets IC flares she really experiences ‘razor blades in her urethra.’” AR 520. At that time, Ms.
18 Kiser also reported that “her main urinary complaint is frequent urination.” *Id.* Although as the
19 ALJ further noted Ms. Kiser reported that she “is not really bothered by her current symptoms”
20 (*Id.*), this statement clearly is contrary to the other two prior statements Ms. Kiser made, and the
21 ALJ did not resolve that inconsistency. In addition, the fact that Ms. Kiser’s symptoms currently
22 were not bothering her does not mean that she was not still subject to “IC flares” at other times
23 or in general. The ALJ’s failure to investigate this further was error. *Tonapetyan v. Halter*, 242

1 F.3d 1144, 1150 (9th Cir. 2001) (where the evidence is ambiguous the ALJ has the duty “to fully
2 and fairly develop the record”) (citations omitted).

3 II. The ALJ’s Assessment of Ms. Kiser’s Credibility

4 Questions of credibility are solely within the control of the ALJ. *Sample v. Schweiker*,
5 694 F.2d 639, 642 (9th Cir. 1982). The Court should not “second-guess” this credibility
6 determination. *Allen v. Heckler*, 749 F.2d 577, 580 (9th Cir. 1984). In addition, the Court may
7 not reverse a credibility determination where that determination is based on contradictory or
8 ambiguous evidence. *See id.* at 579. That some of the reasons for discrediting a claimant’s
9 testimony should properly be discounted does not render the ALJ’s determination invalid, as
10 long as that determination is supported by substantial evidence. *Tonapetyan v. Halter*, 242 F.3d
11 1144, 1148 (9th Cir. 2001).

12 To reject a claimant’s subjective complaints, the ALJ must provide “specific, cogent
13 reasons for the disbelief.” *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996) (citation omitted).
14 The ALJ “must identify what testimony is not credible and what evidence undermines the
15 claimant’s complaints.” *Id.*; *see also Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993). Unless
16 affirmative evidence shows the claimant is malingering, the ALJ’s reasons for rejecting the
17 claimant’s testimony must be “clear and convincing.” *Lester*, 81 F.2d at 834. The evidence as a
18 whole must support a finding of malingering. *See O’Donnell v. Barnhart*, 318 F.3d 811, 818 (8th
19 Cir. 2003).

20 In determining a claimant’s credibility, the ALJ may consider “ordinary techniques of
21 credibility evaluation,” such as reputation for lying, prior inconsistent statements concerning
22 symptoms, and other testimony that “appears less than candid.” *Smolen v. Chater*, 80 F.3d 1273,
23 1284 (9th Cir. 1996). The ALJ also may consider a claimant’s work record and observations of
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1 physicians and other third parties regarding the nature, onset, duration, and frequency of
2 symptoms. *Id.*

3 The ALJ discounted Ms. Kiser's credibility in part because "[t]he medical findings do not
4 support the degree of limitation alleged." AR 27-28. A determination that a claimant's subjective
5 complaints are "inconsistent with clinical observations" can satisfy the clear and convincing
6 requirement. *Regennitter v. Comm'r of Soc. Sec. Admin.*, 166 F.3d 1294, 1297 (9th Cir. 1998).
7 However, the ALJ may not reject those complaints *solely* on the basis of a lack of objective
8 medical evidence. *Byrnes v. Shalala*, 60 F.3d 639, 641-42 (9th Cir. 1995); *Orteza v. Shalala*, 50
9 F.3d 748, 749-50 (9th Cir. 1995). Here, none of the ALJ's other stated reasons for discounting
10 Ms. Kiser's subjective complaints were proper. The ALJ, therefore, could not rely on this basis
11 for finding her to be less than fully credible.

12 The ALJ, for instance, discounted Ms. Kiser's credibility because:

13 Her failure to return to work appears to be an unwillingness to accept
14 responsibility for her particular situation. In a report of her evaluation of the
15 claimant in January 2014, Eileen Bowen, LMHC, stated the claimant ". . .
16 looks to the outside world to change in order for her to feel okay". Although
17 the claimant admitted she looked to other people, rather than herself, for
18 change, she also declared an inability to tolerate the idea that she could change
19 this pattern. She simply wanted other people to "adjust to her dysregulation."

20 AR 28 (internal citations omitted). Nothing in Ms. Bowen's evaluation report, however, indicates
21 Ms. Kiser's unwillingness to accept responsibility, or her looking to the outside world rather than
22 herself for – and her inability to tolerate the idea of – change, was volitional, rather than due to
23 her underlying mental health impairments. *See* AR 516. Accordingly, this reason for discounting
24 Ms. Kiser's credibility was neither clear nor convincing.

25 An additional reason the ALJ gave for not finding Ms. Kiser to be fully credible was her
activity level:

1 The claimant's activity level reveals an ability to function at, perhaps, a
2 higher level than she recognizes. According to her testimony, the claimant
3 performs a host of normal activities, such as taking care of her dogs,
4 cleaning, and gardening. She also reported she visited her boyfriend at his
5 home, as well as driving to appointments and to stores. By her report, she
6 even had spent the weekend before the administrative hearing on Vashon
7 Island, Washington with her friends. Her testimony about her activities does
8 not reveal restrictions inconsistent with a return to work activity.

9 AR 28. An ALJ may base an adverse credibility determination on a claimant's activities of daily
10 living if they can "meet the threshold for transferable work skills." *Orn v. Astrue*, 495 F.3d 625,
11 639 (9th Cir. 2007). However, a claimant's credibility may be discounted on this basis only if he
12 or she "is able to spend a substantial part of his or her day performing household chores or other
13 activities that are transferable to a work setting." *Smolen*, 80 F.3d at 1284 n.7.

14 The claimant, furthermore, need not be "utterly incapacitated" to be eligible for disability
15 benefits, and "many home activities may not be easily transferable to a work environment." *Id.*;
16 *see also Reddick*, 157 F.3d at 722 ("[D]isability claimants should not be penalized for attempting
17 to lead normal lives in the face of their limitations."). A claimant's activities of daily living also
18 may form the basis for an adverse credibility determination if they "contradict his [or her] other
19 testimony." *Orn*, 495 F.3d at 639.

20 The record fails to support the ALJ's determination that Ms. Kiser's daily activities call
21 into question her credibility. First, there is no indication that Ms. Kiser actually performs any of
22 the above activities for a substantial part of the day, or that they necessarily are transferable to a
23 work setting. Second, the record also fails to show Ms. Kiser engaged in the above daily or other
24 activities at a frequency or to an extent that necessarily contradicts her testimony. *See* AR 318-
25 23, 350-51, 363, 482. Thus, this reason for discounting Ms. Kiser's credibility also is not a clear
and convincing one.

The ALJ's last reason for discounting Ms. Kiser's credibility was that the evidence in the

1 record regarding her IC was inconsistent with Ms. Kiser's testimony. But as explained above, the
2 ALJ erred in declining to adopt any functional limitations stemming from Ms. Kiser's IC on this
3 basis. Accordingly, this reason for discounting Ms. Kiser's credibility was erroneous as well, and
4 as such the ALJ's adverse credibility determination must be reversed.

5 III. Remand for Further Administrative Proceedings

6 The Court may remand this case "either for additional evidence and findings or to award
7 benefits." *Smolen*, 80 F.3d at 1292. Generally, when the Court reverses an ALJ's decision, "the
8 proper course, except in rare circumstances, is to remand to the agency for additional
9 investigation or explanation." *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) (citations
10 omitted). Thus, it is "the unusual case in which it is clear from the record that the claimant is
11 unable to perform gainful employment in the national economy," that "remand for an immediate
12 award of benefits is appropriate." *Id.*

13 Benefits may be awarded where "the record has been fully developed" and "further
14 administrative proceedings would serve no useful purpose." *Smolen*, 80 F.3d at 1292; *Holohan v.*
15 *Massanari*, 246 F.3d 1195, 1210 (9th Cir. 2001). Specifically, benefits should be awarded where:

16 (1) the ALJ has failed to provide legally sufficient reasons for rejecting [the
17 claimant's] evidence, (2) there are no outstanding issues that must be resolved
18 before a determination of disability can be made, and (3) it is clear from the
record that the ALJ would be required to find the claimant disabled were such
evidence credited.

19 *Smolen*, 80 F.3d 1273 at 1292; *McCartey v. Massanari*, 298 F.3d 1072, 1076-77 (9th Cir. 2002).
20 Because issues remain in regard to Ms. Kiser's IC and her credibility – and thus in regard to her
21 RFC and her ability to perform other jobs exiting in significant numbers in the national economy
22 – remand for further consideration of those issues is warranted.

23 CONCLUSION

24 Based on the foregoing discussion, the Court finds the ALJ improperly determined Ms.

1 Kiser to be not disabled. The Commissioner's decision to deny benefits, accordingly, hereby is
2 REVERSED and this matter is REMANDED for further administrative proceedings.

3 Dated this 22nd day of June, 2017.

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Theresa L. Fricke
7 United States Magistrate Judge
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